Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-21-14-1993
JAMES FOONG J
25 SEPTEMBER 1996

Evidence *— Previous proceedings — Decision by court-martial — Whether relevant to proceedings in civil court*

Tort *— Vicarious liability — Liability of government — Tort of servants — Officer of Royal Malay Regiment — In charge of orientation programme for new officer — Ragged and assaulted new officer — Tortious acts carried out during officer's normal course of duty — Whether government's contention that tortious act unauthorized a defence — Whether government vicariously liable*

Tort *— Vicarious liability — Liability of government — Tort of servants — Intelligence officer attached to Royal Malay Regiment — Ragged and assaulted new officer during orientation programme — Not officer-in-charge of orientation — Whether what he did was completely independent act of his own — Whether government vicariously liable*

Tort *— Damages — Assault — Personal injury — Loss of hearing — Quantum of damages*

Tort *— Damages — New officer ragged and assaulted during orientation — Whether could claim for 'psychological injury'*

Tort *— Damages — Aggravated damages — New officer ragged and assaulted during orientation — Whether could claim for aggravated damages for humiliation and loss of self-dignity caused*

Tort *— Damages — Exemplary damages — New officer ragged and assaulted during orientation — Whether could claim for exemplary damages*

The plaintiff was a lieutenant attached to the Royal Malay Regiment ('the regiment') based in Kem Lok Kawi, Kota Kinabalu, Sabah ('the camp'). Before he was fully commissioned into the said regiment, he had to undergo an orientation programme. The first defendant was the officer-in-charge of this programme while the second defendant, at all material time, was attached to the regiment as an intelligence officer. The plaintiff alleged that while he was undergoing the orientation programme in the camp, he was ragged and assaulted by the first and second defendants. The plaintiff suffered deafness to his ears which he claimed was the result of such assaults. Both defendants' defence was that of total denial to the claim and that they were acquitted by a court-martial previously. The government of Malaysia was joined as the third defendant, whom the plaintiff claimed was vicariously liable for the actions of the first and second defendants. The third defendant contended that it had not authorized the first

and second defendants' actions on the plaintiff. Thus, it insisted that it was not vicariously liable for the acts of the first two defendants. The plaintiff claimed damages for injuries, 'psychology injury', aggravated damages for the humiliation and loss of self-dignity caused and exemplary damages.

Held, awarding damages for loss of hearing and aggravated damages to the plaintiff:

(1) After examining the evidence as a whole on the issue of liability, this court found substantial circumstantial evidence which were consistent with the allegations of the plaintiff, leading to a conclusion that it was probable what the plaintiff alleged against the first and second defendants was true (see p 343H).

(2) The standard of proof applied in military proceedings was beyond reasonable doubt, whilst in civil courts the burden of proof is on the balance of probability. Therefore, the decision by the court-martial has no bearing upon this civil case (see p 345C).

(3) The test of liability for the third defendant was whether the acts of the first and second defendants were carried out while they were in the course of their duties, to the extent that they were so connected with their authorized duties that they may be regarded as mode of doing them (see p 345E–I); *Canadian Pacific Railway Co v Lockhart* [1942] AC 591 and *Keppel Bus Co Ltd v Sa'ad bin Ahmad* [1972] 2 MLJ 121 followed.

(4) Though the first defendant's acts of assault were unauthorized by the third defendant, they were carried out during the normal course of duty of the first defendant. Thus, his unauthorized acts had become so connected with his authorized acts that they had become modes of doing them. For this, the third defendant must be held vicariously liable for the unlawful actions of this defendant (see p 346C).

(5) The second defendant was never the officer-in-charge of the plaintiff for the orientation programme. What he did upon the plaintiff was a completely independent act of his own, for which the third defendant could not be held vicariously liable (see p 346E).

(6) On the question of causation, based on the close proximity between the time of the assaults and the detection of the plaintiff's injuries, and relying on the evidence as a whole, it was accepted that the more probable cause of the plaintiff's injury was due to the assaults by the first and second defendants rather than other possible causes such as loud noise and effects of drugs and diseases (see p 347B).

(7) For the nature of the plaintiff's injuries, ie loss of hearing, a sum of RM18,000 was the accepted quantum (see p 347C);

Ibrahim bin Mat Yatim & Anor v Gan Jiuk Tiam and *Cheam Yut Cheong v Chung Meng Sum* [1982] 2 MLJ xlviii followed.

(8) The claim for 'psychological injury' was not allowed as there was no substantive evidence to support this claim (see p 347D).

(9) Aggravated damages was to compensate the plaintiff for injuries affecting his feelings arising out of the tortious acts of the defendants. In assessing this, all circumstances of the case must be taken into account, including the character of the plaintiff. The plaintiff was entitled to self respect and dignity. By the acts of the first and second defendants, he had suffered humiliation, loss of pride and self-esteem. The court awarded a sum of RM50,000 as aggravated damages (see p 347E–H); *Ansell v Thomas* [1974] Crim LR 31 followed.

(10) An award for exemplary damages was aimed at punishing the defendants, and displaying the court's indignant attitude towards the acts committed. However, such damages must be restricted to oppressive, arbitrary or unconstitutional action by the servants of the government or where the defendant's conduct had been calculated to make a profit. As these assaults were outside these two categories, exemplary damages would not be awarded (see p 348B–E); *Rookes v Barnard & Ors* [1964] AC 1129 followed.

[Bahasa Malaysia summary

Plaintif adalah seorang leftenan yang ditempatkan di Rejimen Diraja Melayu ('rejimen tersebut') yang berpangkalan di Kem Lok Kawi, Kota Kinabalu, Sabah ('kem tersebut'). Sebelum dia ditauliahkan sepenuhnya di rejimen tersebut, beliau perlu menjalani program orientasi. Defendan pertama adalah pegawai bertugas program tersebut manakala defendan kedua, pada semua masa material, adalah pegawai perisik rejimen tersebut. Plaintif mengatakan bahawa semasa dia menjalani program orientasi di kem tersebut, telah didera dan diserang oleh defendan pertama dan kedua. Plaintif mengalami kecederaan hilang pendengaran yang didakwa disebabkan oleh serangan tersebut. Pembelaan defendan pertama dan kedua adalah penafian sepenuh terhadap dakwaan itu dan bahawa mereka telah dibebaskan oleh mahkamah tentera sebelum ini. Kerajaan Malaysia telah dijadikan sebagai defendan ketiga, di mana plaintif mendakwa bertanggungjawab secara vikarius terhadap tindakan defendan pertama dan kedua. Defendan ketiga menegaskan bahawa ia tidak memberi kuasa kepada defendan pertama dan kedua untuk melakukan tindakan itu terhadap plaintif. Oleh itu, ia menegaskan bahawa ia tidak bertanggungjawab secara vikarius terhadap tindakan defendan pertama dan kedua. Plaintif menuntut ganti rugi untuk kecederaan, 'kecederaan psikologi', ganti rugi teruk untuk penghinaan dan kehilangan maruah diri, dan ganti rugi teladan.

Diputuskan, mengawardkan ganti rugi untuk kehilangan pendengaran dan ganti rugi teruk kepada plaintif: A

(1) Setelah memeriksa keterangan secara keseluruhannya atas isu liabiliti, mahkamah ini mendapati bahawa banyak keterangan ikut keadaan yang konsisten dengan pengataan plaintif, yang membawakan kepada kesimpulan bahawa besar kemungkinan apa yang plaintif katakan terhadap defendan pertama dan kedua adalah betul (lihat ms 343H). B

(2) Standard bukti yang terpakai dalam prosiding militari adalah melampaui keraguan munasabah, manakala dalam mahkamah sivil beban bukti adalah atas imbangan kebarangkalian. Oleh itu, keputusan oleh mahkamah tentera tidak mempunyai kaitan ke atas kes sivil ini (lihat ms 345C). C

(3) Ujian liabiliti untuk defendan ketiga ialah sama ada tindakan defendan pertama dan kedua telah dilakukan semasa mereka menjalankan tugas mereka, sehingga begitu berhubungan dengan tugas yang mereka telah diberi kuasa untuk buat sehingga mereka boleh dianggap sebagai cara membuat tindakan tersebut (lihat ms 345E–I); *Canadian Pacific Railway Co v Lockhart* [1942] AC 591 dan *Keppel Bus Co Ltd v Sa'ad bin Ahmad* [1972] 2 MLJ 121 diikut. D

(4) Walaupun tindakan serangan defendan pertama tidak diberi kuasa oleh defendan ketiga, ianya dilakukan semasa defendan pertama menjalankan tugas biasanya. Oleh itu, tindakannya yang tidak diberi kuasa telah menjadi begitu berhubungan dengan tindakannya yang diberi kuasa sehingga mereka telah menjadi cara membuat tindakan tersebut. Untuk ini, defendan ketiga mesti diputuskan sebagai bertanggungjawab secara vikarius (lihat ms 346C). E F

(5) Defendan kedua tidak pernah menjadi pegawai bertugas kepada plaintif bagi program orientasi itu. Apa yang dilakukan terhadap plaintif adalah sepenuhnya tindakan bebas sendiri, yang mana defendan ketiga tidak bertanggungjawab secara vikarius (lihat ms 346E). G

(6) Berkenaan dengan persoalan penyebaban, berdasarkan kedekatan hampir di antara masa serangan dan pengesanan kecederaan plaintif, dan bergantung kepada keterangan secara keseluruhannya, adalah diterima bahawa sebab kecederaan plaintif yang lebih mungkin ialah serangan oleh defendan pertama dan kedua, dan bukan sebab-sebab lain yang mungkin seperti bunyi bising yang kuat dan kesan dadah dan penyakit (lihat ms 347B). H

(7) Untuk jenis kecederaan seperti yang dialami oleh plaintif, iaitu kehilangan pendengaran, jumlah sebanyak RM18,000 adalah kuantum yang diterima (lihat ms 347C); *Ibrahim bin Mat* I

Yatim & Anor v Gan Jiuk Tiam and *Cheam Yut Cheong v Chung Meng Sum* [1982] 2 MLJ xlviii followed.

(8) Tuntutan untuk 'kecederaan psikologi' tidak dibenarkan kerana tidak ada keterangan substantif untuk menyokong tuntutan ini (lihat ms 347D).

(9) Ganti rugi teruk adalah sebagai pampasan kepada plaintif terhadap kecederaan yang menjejaskan perasaannya yang timbul daripada tindakan tort defendan-defendan. Dalam membuat kiraan ini, semua keadaan-keadaan kes mesti diambil kira, termasuk keperibadian plaintif. Plaintif berhak kepada rasa hormat dan maruah. Tindakan defendan pertama dan kedua telah menyebabkannya menanggung penghinaan, kehilangan maruah dan harga diri. Mahkamah mengawardkan jumlah sebanyak RM50,000 sebagai ganti rugi teruk (lihat ms 347E–H); *Ansell v Thomas* [1974] Crim LR 31 diikut.

(10) Award untuk ganti rugi teladan adalah bertujuan untuk menghukum defendan-defendan, dan menunjukkan sikap marah mahkamah terhadap tindakan yang dilakukan. Walau bagaimanapun, ganti rugi tersebut mesti dihadkan kepada tindakan kakitangan kerajaan yang menindas, arbitrari atau yang melanggar perlembagaan atau di mana tindakan defendan-defendan dilakukan untuk mengaut keuntungan. Oleh kerana serangan-serangan itu berada diluar dua kategori ini, ganti rugi teladan tidak diawardkan (lihat ms 348B–E); *Rookes v Barnard & Ors* [1964] AC 1129 diikut.]

Notes

For cases on claim of damages in tort, see 12 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 87–134.

For cases on vicarious liability, see 12 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 974–1024.

Cases referred to

Ansell v Thomas [1974] Crim LR 31
Broome v Cassell & Co Ltd [1972] AC 1027
Canadian Pacific Railway Co v Lockhart [1942] AC 591
Cheam Yut Cheong v Chung Meng Sum [1982] 2 MLJ Xlviii
Ibrahim bin Mat Yatim & Anor v Gan Jiuk Tiam
Keppel Bus Co Ltd v Sa'ad bin Ahmad [1972] 2 MLJ 121
Rookes v Barnard & Ors [1964] AC 1129

Karpal Singh (*Karpal Singh & Co*) for the plaintiff.

Abdul Halim Mohd Hariri (*Halim Chim & Co*) for the first and second defendants.

Abu Bakar Jais (Senior Federal Counsel) for the third defendant.

James Foong J: The plaintiff was a lieutenant attached to the 16th battalion of the Royal Malay Regiment ('the said regiment') based in Kem Lok Kawi ('the camp'), Kota Kinabalu, Sabah. He first reported for duty on 2 September 1991, fresh after graduating from the Royal Military College ('the RMC'). Before he was fully commissioned into the said regiment, he had to undergo an orientation programme. The officer-in-charge of this programme, which was to be for a period of two weeks, was the first defendant, then holding the rank of captain in the said regiment. The second defendant was also a captain, and at all material time was attached to the said regiment as an intelligence officer.

The plaintiff alleged that while he was undergoing the orientation programme, he was ragged and assaulted by the first and second defendants. The first of the alleged incidents occurred on 8 September 1991 at the officers' mess in the camp. The plaintiff accused the first defendant of ordering him to hold a used cylinder shell weighing one to two kilograms with a circumference of five inches by one foot in height with his hands full stretch. When he was unable to continue, the first defendant boxed him on his head and ear. Also involved in such an assault was the second defendant. By 12 midnight, after the first defendant had left the premises, the second defendant grabbed the plaintiff by his necktie and dragged him until he fell choking, crying and screaming. One Major Madalan, the then second in command of the regiment appeared, and upon noticing this, reprimanded the second defendant. According to the plaintiff, the second defendant immediately apologised to Major Madalan for his actions.

The second of the alleged incidents happened on 11 September 1991 around 11.30pm. This was at the computer enclosure next to the operation room in the camp. The plaintiff complained that the first defendant instructed him to do push ups, and while the plaintiff was on the floor he was kicked and boxed on his right ear by the first defendant. The plaintiff attempted to escape from such beatings by running away, but was pursued by the first defendant hot on his heels. At or near the door of the VIP quarters in the camp, the plaintiff fell to the ground and shouted for help. His plea was answered by one Lieutenant Colonel Zainal Yen, who was then a staff officer from the Ministry of Defence on some special mission to the said regiment. When cautioned by this senior officer with 'Don't tell me Mustafa, I know what's going on!', the first defendant remained silent. Orders were then given to escort the plaintiff and the first defendant separately to have their respective statements recorded.

Subsequent to this incident, the first defendant was replaced as an officer-in-charge of the plaintiff's orientation programme. Matters did not rest there, for the plaintiff complained to the then commanding officer of the said regiment, one Colonel Zaki (OW4) of the first and second defendants' misdeeds. This lead to an investigation into the incidents, which eventually resulted in the first and second defendants being tried in

A a court-martial for assaulting the plaintiff. However, both these defendants were acquitted by the Military Tribunal of the charge.

The plaintiff continued his service with the said regiment until he voluntarily resigned from the force on 2 November 1993, after serving three years and two months.

B The plaintiff claimed that immediately after his alleged assault, he sought medical treatment from the camp hospital. This was followed by an ENT specialist examination on 12 and 17 December 1991 at the military hospital, when he complained of deafness in his ears. One Dr Abdul Hakim bin Jaafar (DW2) ('Dr Hakim') treated him, and found that he C suffered profound deafness to his right ear, with mild deafness on his left. This, the plaintiff claimed, is due to the said assault upon him by the first and second defendants, and upon this, the plaintiff is seeking damages from them. The plaintiff is also seeking damages from the third defendant, whom he claimed is vicariously liable for the actions of the first and second defendants.

D On 17 May 1996, after the close of the plaintiff's and defendants' case on the issue of liability, this court found the first and second defendants liable to the plaintiff s claim. In respect of the third defendant, which is the Government of Malaysia, this court reserved judgment until after the issue on quantum is heard.

E After hearing the entire case, this court now gives its grounds of judgment on the issue of liability of the parties and proceeds to award damages.

From the pleadings and evidence tendered by the first and second defendants, their defence is that of a total denial to the plaintiff's claim. F They testified that they have not assaulted the plaintiff at any time. In respect of the third defendant, their stand is that they have not authorized the first and second defendants' actions on the plaintiff; in fact under existing regulations from the military high command, any form of ragging is and was prohibited. For this they insisted that they are not vicariously liable for the acts of the first two defendants committed on the plaintiff (if G any).

It is a fact that there is no other eye witness to collaborate the plaintiff's claim on the alleged assault. However, after examining the evidence as a whole on the issue of liability, this court found substantial circumstantial evidence which are consistent with the allegations of the H plaintiff, leading to a conclusion that it is probable what the plaintiff alleged against the first and second defendants is true.

To begin with, both these two defendants never denied that they were not with the plaintiff on the night of 8 September 1991. The plaintiff was under the charge of the first defendant at this material time, and the I second defendant was attached to the said regiment stationed in the camp. If there had been no assault on the plaintiff on this night in question, why was the plaintiff in such a stage of dishevel when Major Madalan

encountered the couple? Why was there a necessity for the second defendant to ask for pardon from this senior officer if he had not committed any serious wrong? In the second defendant's statement (exh D10) recorded by the military police after this incident, the second defendant gave the explanation that he tendered his apology to Major Madalan on that particular night because he felt that he was disturbing the major at such late hours on some official business. This can hardly be believed, for if it was serious official business to be discussed with the major, there was no necessity to seek a pardon. One only ask for pardon when a serious wrong is committed, which, in this case, must be the assault on the plaintiff.

It is also important to note that the second defendant had in exh D10 described the plaintiff as wearing a tie and jacket at the material time. This is consistent with the testimony of the plaintiff on his attire which gave an opportunity to the second defendant to drag the plaintiff by his tie after assaulting him.

The second defendant has denied any ill feeling towards the plaintiff and asserted that he has treated the plaintiff with civility as a senior would to a junior. This was by way of encouragement and advice. However, when exh D10 was produced under cross-examination, it reveals a completely different scenario. The second defendant had called the plaintiff a hypocrite over the plaintiff 's request to perform his prayers. This is far cry from the brotherly love which the second defendant claimed to have showered upon the plaintiff. The display of animosity towards the plaintiff had been shown before the alleged incident as disclosed in exh D10, and from the incidents and the events as described by both the plaintiff and the second defendant on the evening of 8 September 1991, this court found on the balance of probability that the second defendant had assaulted the plaintiff as claimed.

As for the first defendant, the most telling incident that implicated him happened on the night of 11 September 1991. He has admitted under cross-examination that he gave chase to the plaintiff when the plaintiff failed to answer certain questions while in the operation room. If answer was not forthcoming from the plaintiff, certainly there was no necessity to resort to a hot pursuit until the plaintiff had to seek assistance and help by pleading and crying on the ground outside the VIP room of a very senior visiting officer to the camp. By the same token, if the plaintiff had not been severely assaulted by the first defendant, there was no necessity for him to run for his life. Again, why was there a rebuke by Lieutenant Colonel Yan on the first defendant with, 'what is happening?' and 'why are you angry with this young officer?' if the first defendant's intention was only to seek an answer from the plaintiff? Surely the first defendant would have offered a simple explanation to this senior officer if what he claimed was true. Instead, he chose to remain silent. Under these circumstances silence certainly implies guilt. Though the first defendant attempted to explain in his re-examination that his silence at that time was due to the fact that he need not answer to an officer not attached to the regiment, this explanation

is completely absurd in the light of the situation at that moment. The plaintiff was chased by the first defendant and the plaintiff has fallen on the ground screaming for help. A senior officer of the same uniform intervened and questioned the occurrence. Any normal man, military officer or otherwise, in a non-war time environment would have answered and given his simple explanation unless, he is guilty of misconduct. From these facts and situations, the first defendant must have assaulted the plaintiff on the occasions alleged, otherwise the plaintiff would not have been so fearful of this defendant as to flee and seek help in such a desperate manner on 11 September 1991.

Though the defendants may have been acquitted by a court-martial for the assault on the plaintiff, but as correctly submitted by Encik Karpal Singh, counsel for the plaintiff and as confirmed by the president of that Military Tribunal (DW3), the standard of proof applied in that military proceedings was beyond reasonable doubt, whilst in this civil courts the burden of proof is on the balance of probability. Therefore, the decision by the court-martial has no bearing upon this civil case.

This court shall now deal with the issue of liability of the third defendant. The principle to apply in such situation is well established in the case of *Canadian Pacific Railway Co v Lockhart* [1942] AC 591 at p 599, which adopted a passage from Salmond on *Torts*. In turn, it is accepted by our Malaysian courts in *Keppel Bus Co Ltd v Sa'ad bin Ahmad* [1972] 2 MLJ 121 which was affirmed by the Privy Council in [1974] 1 MLJ 191. It is as follows:

> It is clear that the master is responsible for acts actually authorized by him, for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes — although improper modes — of doing them. In other words, a master is responsible not merely for what he authorizes his servants to do, but also for the way in which he does it. On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible, for in such a case the servant is not acting in the course of his employment, but has gone outside of it.

Military Regulations in exh D7 expressly prohibits ragging among officers. By this provision, the third defendant claimed that the practice of such activities is and was unauthorized and will not be tolerated. Though this may be so, but this court has still to decide based on the entire evidence whether the acts of the first and second defendants were carried out while they were in the course of their duties, to the extent that they were so connected with their authorized duties that they may be regarded as mode of doing them.

The first defendant was assigned as a duty officer to carry out the orientation programme for the plaintiff. A scheduled programme (P3) was drawn up by the first defendant which was approved by the regiment's commanding officer, DW4. For each day of the two weeks course, there were lectures and physical activities conducted by some senior officers of the regiment, including the first defendant. Nevertheless, throughout the entire duration of this programme, the plaintiff was directly under the charge, supervision and control of the first defendant as an appointed officer-in-charge of the orientation. His orders were expected to be obeyed by the plaintiff. On both the occasions when the assault occurred, the orientation programme was still underway. Though the first defendant's acts of assault were unauthorized by the third defendant, they were carried out during the normal course of duty of the first defendant. Such being the case, his unauthorized acts have become so connected with his authorized acts that this court finds them to have become 'modes — although improper modes — of doing them. For this, the third defendant must be held vicariously liable for the unlawful actions of this defendant.

The second defendant's position is somewhat different. He was never the officer-in-charge of the plaintiff for the orientation programme. Except for two sessions recorded in P3 where he was involved in instructing the plaintiff on 'Undang-Undang Tentera' and 'Pentadbiran Kenaikan Pangkat', this defendant was not assigned with any official duties towards the plaintiff. He was only an officer attached to the intelligence arm of the regiment, and has nothing to do with the plaintiff except for what was stated. What he did upon the plaintiff on 8 November 1993 was not within the period he was lecturing the plaintiff. It was a completely independent act of his own for which the third defendant cannot be held vicariously liable.

As for quantum of damages, the plaintiff claimed profound loss of hearing on his right ear and mild deafness to his left. En Halim, counsel for the first and second defendants, attempted to convince this court that this could be caused by previous assaults of similar nature on the plaintiff by his seniors at the RMC. To this, however, Dr Hakim has to a large extent nullified this theory. He had treated the plaintiff previously, but found him to have suffered no such loss of hearing in 1990 in consequent to the plaintiff's complaint of assault at the college. This loss was only detected in his examination of the plaintiff in December 1991 subsequent to a complaint by the plaintiff of the assaults by the first and second defendants.

The learned doctor has also enlightened this court that the cause for such loss of hearing could be due to other various factors such as loud noise and effects of drugs and diseases besides a box or slap on the plaintiff's face. However, one can immediately dismiss the causation in this case to be associated with drugs and diseases due to the complete absence of evidence and/or contention by the defendants on this score. This leaves excessive noise and assault. The former is contended by the defendants as the likely cause, since the said regiment — being an infantry unit — used firearms and explosive as their major armament for their

A exercise. The plaintiff, being an officer in this unit, would certainly be exposed to undue loudness caused by such weapons.

This court disagrees with this contention. The plaintiff must have been exposed to firearms and the excessive noise caused by explosion while undergoing training at the RMC. Yet he suffered no adverse effect
B on his audio faculties. It was only subsequent to the assault by the first and second defendants that his hearing was impaired. Based on this close proximity between the time of the assaults and the detection of the plaintiff's injuries, and relying on the evidence tendered in this court as a whole, this court accepts Dr Hakim's finding that the more probable cause of the plaintiff's injury is due to the assaults on the plaintiff's head and face.

C For the nature of the plaintiff's injuries, a sum of RM18,000 seems to be the accepted quantum (see *Ibrahim bin Mat Yatim & Anor v Gan Jiuk Tiam* and *Cheam Yut Cheong v Chung Meng Sum* [1982] 2 MLJ xlviii. Without any competing authorities tendered by the defendants, this court hereby awards a sum of RM18,000 to the plaintiff for the loss of hearing.

D The plaintiff has also pleaded 'psychological injury' resulting from the assault, but no admissible evidence was led to support this claim. In the absence of any substantive evidence, besides the bare assertion by the plaintiff under this head of injury this court hereby refuses the plaintiff's claim for this item.

E Encik Karpal Singh in his submission highlighted that within the category of compensatory damages, aggravated damages can also be awarded. This category of damages is described as (per Lord Diplock in *Broome v Cassell & Co Ltd* [1972] AC 1027 at p 1124):

> ...compensation for the injured feelings of the plaintiff where his sense of
F injury resulting from the wrongful physical act is justifiably heightened by the manner in which or motive for which the defendant did it.

It is to compensate the plaintiff for injuries affecting his feelings arising out of the tortious acts of the defendants. In assessing this, all circumstances of the case must be taken into account, including the character of the
G plaintiff: see Edmund Davis LJ in *Ansell v Thomas* [1974] Crim LR 31.

In the opinion of this court, the plaintiff may at the material time be weaker, less experience and lower in rank to the first and second defendants, but he was entitled, as all young officers do, to self respect and dignity. By the acts of the first and second defendants, he has suffered humiliation, loss of pride and self-esteem. Instead of being encouraged, advised and
H protected by these two seniors, the plaintiff was insulted and assaulted by them. To compensate the plaintiff for the injury to his feelings, this court awards a sum of RM50,000 as aggravated damages.

Encik Karpal Singh also attempted to persuade this court that the defendants should also be made to pay exemplary damages. According to
I him, this award should be made to impress upon the defendants that 'tort does not pay', and simultaneously to deter others from practising such unlawful acts. He cited no reported cases found in our local law journals to support this proposition, but instead tendered a newspaper report quoting a sessions court award of RM200,000 against the government of

Malaysia for an assault on an individual during police detention. This sum — the newspaper (*The Sun* dated 2 April 1996) reported — was apportioned between aggravated damages, RM50,000 and exemplary damages, RM160,000.

While considering the request for exemplary damages, this court must bear in mind that the objective for an award under this category is to punish the defendants, and to display the court's indignant attitude towards the acts committed by the defendants. However, through the enlighten judgment of Lord Devlin in *Rookes v Barnard & Ors* [1964] AC 1129 (at p 1226), such damages must be restricted to situation where there are 'oppressive, arbitrary or unconstitutional action by the servants of the government' or where 'the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.'

Outside these two categories, exemplary damages should not be awarded.

In our case, the latter classification does not apply. There is no evidence to support a finding that the defendants' conducts were calculated for the purpose of making a profit for themselves which exceeds the compensation payable to the plaintiff.

As for the first, this court is of the view that there is no aggravating circumstances or oppression, nor is there any element to justify the unlawful acts of the defendants to reach the stage of being unconstitutional. From the evidence adduced, it appears that the first and second defendants motive for the assault on the plaintiff was to revive the practice of ragging which was common in the former days. This is a display of superiority attitude by an immediate senior officer who has not achieved any admirable degree of recognition to inflict humiliation and often by physical force on his subordinate to lower his self-esteem and dignity. Though such practices have been prohibited in the military establishment, but unfortunately this did not seem to have been acknowledged by the first and second defendants. It is the opinion of this court that with what has transpired after the incident, and the award of substantial compensatory damages which includes aggravated damages which the defendants would have to pay, the first and second defendants would be sufficiently punished for their irresponsible actions without having to add on further with exemplary damages. It is also aspiration of this court that this award of significant damages would also deter others from continuing or reviving the practice of such unlawful act of ragging in any establishment, be it the military or an institution of higher learning.

The total amount of damages hereby awarded is a sum of RM68,000. This sum should be apportioned into equal share, with the first and third defendants responsible to pay the plaintiff a sum of RM34,000, and the second defendant responsible for the other RM34,000. This court hereby also orders the defendants to pay the plaintiff's costs.

Order accordingly.

Reported by Tey Tsun Hang